2001

Salt Bowl Company v. State of Utah : Brief of Appellant

Utah Supreme Court

SALT BOWL COMPANY, a
UTAH CORPORATION
Plaintiff and Respondent

—vs.—

STATE OF UTAH
Defendant and Appellant

Case
No. 13847

APPELLANT'S BRIEF

Appeal from the Third Judicial District Court
of Salt Lake County, Utah
honorable Jay E. Banks, Judge

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CASES

IN THE SUPREME COURT OF THE STATE OF UTAH

SALT BOWL COMPANY A UTAH CORPORATION

Plaintiff and Respondent

—vs—

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NATURE OF THE CASE

This is a Civil action to recover damages for alleged wrongful termination of a lease agreement between the parties above named. Appellant served a notice of violation on the Respondent to which the Respondent responded by cancelling auto races scheduled at the Utah State Fairgrounds. The notice of violation was served by Appellant in response to a "noise ordinance" passed by Salt Lake City and a failure on the part of Respondent to obtain a variance from Salt Lake City to conduct its races.

The case was tried in two parts without a jury. The first part on the question of liability and the second part on the question of damages.

DISPOSITION IN TRIAL COURT

The trial court found that Respondent was entitled to damages caused by the wrongful termination by Appellant of a Lease agreement between the parties.

RELIEF SOUGHT

Appellant seeks a reversal of the courts judgment or remand of the case with an instruction that the notice of violation was legally justifiable and that respondent is not entitled to damages.

STATEMENT OF FACTS

Appellant, Division of Expositions of the State of Utah, and Respondent, Salt Bowl Company, entered into a five year lease agreement on October 11, 1967. (Ex P-1, R-32, Tr 20). The lease was for a period from May 1, 1967 to May 1, 1973 and granted Respondent the right to use certain portions of the Utah State Fairgrounds to conduct auto racing. The lease agreement contained an exclusive option to renew the lease agreement for an additional term of five years. (R-32, Ex P-1 paragraph 18).

Two methods are provided in the lease agreement for termination. Paragraph 13 provides for automatic termination if a Court having jurisdiction determines that Lessee's activities are unlawful Paragraphs 9 and 16 provide a second method of termination. Paragraph 9 requires the lessee to "conduct activities on the above

described premises in a lawful manner. . . . .shall comply with all. . . .Local laws in connection with its operations. . . . . ." Paragraph 16 provides that if Lessor has reason to believe Lessee is in violation of any "Local Law" the Lessor shall send Lessee a notice of violation and Lessee is required to correct the violation within 5 days or the lease will be terminated.

The subject case involves the above described lease and a request for renewal of the lease by Respondent filed May 1, 1973 (Ex P-3) and a notice of violation served on Respondent May 12, 1973 pursuant to paragraph 9 of the lease. (Ex P-4) The notice of violation was served for violation of the Salt Lake City "Noise Ordinance" (32-9-3 subparagraph P, Revised Ordinances of Salt Lake City) specifically for races run on the 6th day of September, 1972 but generally for running any races in violation of the ordinance. The notice provided for the 5 day cure period but stated that the "termination was to be effective in the 6th day after service of this notice since there is no way in which the said violation can be corrected within said period of time." (Ex P-4)

The notice of violation was based on the belief by the Attorney General's office who were reviewing the subject lease for renewal that Respondent had run races exceeding the noise limits imposed by the ordinance and at the time of the notice of violation further believed that Respondent could not run races in compliance with the Ordinance. (Tr. 146Ln.27-147Ln.2 and Tr.60Ln.12-18 Testimony of Frank Nelson, Assistant Attorney General and Robert B. Hansen Deputy Attorney General)

The history behind the actual serving of the notice of violation by Appellant reveals that on August 16, 1972, Salt Lake City passed an ordinance which would

require Respondent to comply with a decibel rating of 65 decibels in conducting its races (Tr.163 M 21). It was stipulated in open Court (Tr. 176 Ms 5-8) that the map introduced as Exhibit D-5 showed zones which required a 65 decibel compliance.

In July of 1972, the Respondent made noise level tests using an H. H. Scott Company sound level meter (Tr157Ln. 24-30 Tr.80) approximately one block north of the fairgrounds at 1000 West and 300 North during actual warmups and races. (Tr.158Ln.8-10) The results ranged from the low to mid 70's which readings were higher than the ordinance allowed.

Based on the July tests Respondent went before the Salt Lake City Commission and asked for variances for August 19, 26 and September 4. (Ex8-D) The Board of City Commissioners granted variances specifically for the days of August 19, 26, and September 4. (Ex. 9-D). The races scheduled for the 4th were rained out and rerun on the 6th. Respondent made no attempt to obtain a variance for the 6th.

Respondent in the Spring of 1973, appeared before the Salt Lake City Commission to request a variance to 78 devibels based on its earlier July tests (Tr. In.10-30) The hearing was held May 10, 1973 and Respondent represented to the Commission that "If the variance was not granted that we would have to change our method of racing, or racing as we had done in the past, we would not be able to do in the future. (Tr.166 Ln. 28-30).

The Commission denied Respondent's request for a variance based on tests made by Irvine Accoustical Engineers which showed the noise level of the race would be 13 points higher than allowable (Tr.170 Ex11-D)

There were newspaper reports that Respondent

intended to race on the 12th of May at its regularly scheduled race. The Appellant made the decision to serve the notice of violation on Respondent prior to the race on the 12th of May (Tr.151 Ln.27-30). Respondent cancelled the race of the 12th voluntarily and has not raced since that time at the Fairgrounds. (Tr. 230Ln. 24-30) (Findings of Fact (3) R-9). A noise test was run that same day on the 12th of May with one car and again the noise from one car exceeded the decibel level required by the ordinance. Ferrol Papworth told Mr. Hugh Bringhurst, Director of Expositions that he could not run within the decibel levels required by the Ordinance (Tr. 133 Ln. 2-18).

Thereafter a letter was written on June 11, 1973 inviting the Respondent to return to the Fairgrounds to race (R-9 Finding No. 4) which invitation Respondent did not accept. No legal action was taken by Respondent such as injunction until this present action was filed. (Tr.231Ln.4 and 19)

ARGUMENT

POINT I.

AFTER FINDING THAT THE RACE CONDUCTED ON SEPTEMBER 6, 1972 WAS IN-VIOLATION OF 32-9-3 *REVISED ORDINANCES OF SALT LAKE CITY,* THE COURT ERRED IN NOT CONCLUDING THAT VIOLATION WAS A LEGALLY JUSTIFIABLE GROUNDS FOR SERVING "notice of violation" ON RESPONDENT, SALT BOWL COMPANY.

In discussion with counsel on Friday, January 11, 1974 (Tr.192 Ln.20-28) the court found that the race conducted on September 6, 1972 was in violation of the "Noise Control" Ordinance. The court stated:

> "This pretrial order kind of bothered me in this thing because with reference to that race in September, whenever it was, I would have to find that that was a violation of the ordinance. . . . ."

The court went on to state:

> ". . . . .but at the same time I can't see that it makes any difference. They should have had a waiver, and really its just a days continuance, so I don't take that into consideration at all. . ."

The notice of violation served by the Appellant dated May 11, 1973 was based on the September 6, 1972 race conducted in violation of the Noise Ordinance. The court found that it was a violation as had the Attorney General's office. According to Paragraph 9 of the lease agreement such a violation is grounds for issuing a notice of violation as per paragraph 16 of the agreement, which Appellant did.

The court indicated that the violation was not important because it was a technicality based on the fact that the September 4, 1972 race which was protected by the variance had been postponed until September 6, 1972. This view taken by the court overlooks the reason why all parties were concerned about the September 6th race, i.e., because it was a race which violated the ordinance due to the noise it created and not because it was not covered by a variance.

As the Attorney General's office knew that Respondent had violated the "Noise Ordinance" by exceeding the decibel level in an R4 Zone on September 6, 1972, when it learned that no variance had been granted by the Salt Lake City Board of Commissioners for the 1973 season (Tr.143Ln.3-14) it used the violation of September 6, 1972 as a basis for the

"notice of violation" dated May 11, 1972. (Tr.145Ln.27-29) It was a violation in the eyes of the Attorney General's Office because the race was run at sound levels in excess of the ordinance and not merely because no variance was granted for the race. (Tr.153 Ln.25-28) It was reasonable to believe that without the benefit of a variance, Respondent could not race legally. The lease agreement states that Respondent "Shall comply with all local laws" which the noise tests showed they could not do. "Shall comply" implies that without the variance it was clear the respondent violated or would violate the ordinance.

Mr. Robert Hansen, Deputy Attorney General and Mr. Frank Nelson, Assistant Attorney General both testified that the "notice of violation" was served because the Respondent had conducted races in excess of the noise limits imposed by the ordinance and Salt Lake City would not grant them a variance, (Tr.146 Ln.27-147 Ln.2) Mr. Ferrol Papworth, President of Respondent company, told Mr. Hugh Bringhurst, director of the Division of Expositions, on May 12, 1973 that he could not run a race within the ordinance (Tr.133Ln.2-18). It was no surprise to anyone that a "notice of violation" was served. The evidence based on the Respondent's own study is nearly conclusive that Respondent could not run without violating a municipal ordinance and hence violate paragraph 9 of the lease agreement. The "notice of violation" pursuant to the lease agreement gave Respondent 5 days to show whether or not they could comply with the ordinance. Rather than conduct the race scheduled on May 12, 1972, Respondent tested the noise levels of one car on that date and found the noise from a single car in excess of the required level. (Tr.133Ln.9-26). Knowing that it could not race, within the ordinance Respondent

voluntarily cancelled the race scheduled that day (Courts Findings of Fact (3) R 9). Respondent has not to this day tried to run at the Fairgrounds.

It is submitted that all parties understood that the "notice of violation" was for races run in excess of the level proscribed by the ordinance and that Respondent could not comply with the ordinance. However, the court found the "notice of violation" was without legal justification.

After finding the September 6, 1972 race was in violation of the "Noise Ordinance", the court committed reversible error in holding that the "notice of violation" was without legal justification. The court wrongly ignored its own finding of violation of a municipal ordinance, when the lease agreement in paragraphs 9 and 16, specifically states that such a violation is grounds for the issuance of said "notice of violation". If this determination is allowed to stand then the lease agreement and the procedure it employs for the issuance of a "notice of violation" is emasculated.

The trial judge erred in holding that the notice of violation was without legal justification. For a second reason Paragraph 9 of the lease agreement stipulates that Respondent must conduct races on the leased premises within all national state, and local laws. Paragraph 16 provides that when the Lessee conducts races in violation of any of said laws that the Lessor must serve upon Lessee a notice of violation and if the Lessee cannot demonstrate its ability to conduct races within local ordinances, the lease may be terminated.

The early cases hold that when subsequent legislation makes a prior contract illegal either in its object or in its performance then both parties are excused from performance and breach of contract is not available against either party. *Corbin on Contracts*

s1343. The only caveat to this general rule is that the Lessee must have an opportunity to correct, as provided for in the lease agreement.

But once the Lessor is made aware that the leased premises are being used for an illegal purpose he has a duty to inform the Lessee of the violation and require a cessation of the illegal use. If the Lessor does not indicate his disapproval of the Lessee's illegal use of the premise, he may be held in pari dilicto with the Lessee and courts will not lend the Lessor aid in collecting rent, *Kessler v. Pearson* 126 Ga. 725, 55 S.E.963.

Even absent a provision in the lease, a landlord is said to have the right to void a lease when a use of the premises by the tenant violates a zoning law. 101C.J.S., *Zoning*, S138. Furthermore, even a minor breach is sufficient to justify a termination of a contract if the contract is so worded. *Ritter v. Perma Stone Co.* 325 P.2d.442 (Okl.1958). The lease between Appellant and Respondent provides that any violation of local, state, or municipal ordiance or law is a sufficient ground to terminate the lease and further that respondent "shall comply" which submitted is a broader requirement than a violation.

The court committed reversible error in ruling that the notice of violation was without legal justification. The procedure whereby the notice was served is outlined in the lease agreement. Respondent company had five days in which to correct, challenge, or show they could run races within existing local ordinances, and said procedure is in harmony with the existing rules governing landlord-tenant relationships.

The Appellant was put in a delicate position by the notice of renewal of the lease at this same time (May, 1973.) Based on the information that the State had, Respondent could not have complied with the "Noise

Control" ordinance. Therefore, the State wanted to make certain whether or not races could be conducted legally before renewing the contract. The Appellant was forced to either recognize the lease and run the risk that by renewing the lease it would waive any right to complain of breaches or to serve a notice of violation 51C. C.J.S. *Landlord and Tenant* S117 (3).

Given the two considerations: (1) renewal of the contract may have jeopardized the Appellants opportunity to enlist the aid of the courts in collecting rent; (*Kessler v. Pearson* 126Ga. 725, 55 S.E. 963) and (2) the potential that renewal of the lease knowing of a violation of a local ordinance may have constituted a waiver of the right to complain of breaches 51C-C.J.S. *Landlord - Tenant* S117 (3); the Appellant decided to serve the notice of violation. As this procedure was outlined in the lease agreement and in harmony with the law governing landlord and tenant relations, the court erred in holding the notice of violation without legal justification.

POINT II.

THE COURT ERRED IN HOLDING THAT THE NOTICE OF VIOLATION SERVED MAY 12, 1973 WAS IN VIOLATION OF THE TERMS OF THE LEASE.

Under the lease agreement there are two ways the lease can be terminated. Paragraph 13 provides for an automatic termination:

> "It is expressly understood and agreed that in the event Lessee's activities upon the leased premises are determined by any Court having jurisdiction to be unlawful or to constitute a public nuisance, whether in litigation commenced by anyone. Then and in such event, this lease

agreement shall be terminated forthwith, and the obligations of both parties hereunder shall be immediately avoided and suspended."

While paragraphs 9 and 16 provide for termination by filing a notice of violation and Lessee's failure to cure:

"Lessee shall conduct activities on the above described premises in a lawful manner. Lessee will not suffer or permit any illegal business or transaction of which it has knowledge to take place upon or near said premises. Lessee shall comply with all Federal, State and Local Laws in connection with its operations upon said premise."

Paragraph 16

"The Lessor may terminate this Lease Agreement at any time if the Lessee violates any of the terms and conditions herein contained, provided, however, said termination may not be effected until and unless Lessor has given Lessee written notice of each violation and the same remains uncorrected for a period of (5) five days after receipt of said notice."

Both methods of termination of the contract are valid, however, the method used by the Respondent was the method relying on paragraphs 9 and 16. The notice of violation specifically stated it was served pursuant to paragraph 9 of the lease. That this method is recognized as valid by the Utah Supreme Court is shown in the case of *Gerard v. Young 20U.2d.30, 432* P.2d.343 (1967). In *Gerard* the Lessor was entitled to terminate the lease where the leased premises were being used in violation of State law and the violation continued.

On the 16th day of August, 1972 an ordinance was passed by the Board of Commissioners of Salt Lake

City, Utah by adding Chapter 9, entitled "Noise Control" to Title 32 of the Revised Ordinances of Salt Lake City, Utah. Respondent was aware of this ordinance and through its attorney, Mr. Lee Hobbs, wrote to the Salt Lake City Commission to acquire an exemption from the ordinance on August 14, 1972. The request reads as follows:

> "With reference to the 'Noise Abatement' ordinance which your Honorable Body is presently considering, my client, The Fairgrounds Speedway Company, has presently scheduled automobile racing at the State Fair Grounds in Salt Lake City for August 19, 26 and September 4. They have also scheduled the 'Tournament of Thrills' for August 21 and 22."
>
> "My client presently holds a license issued by Salt Lake City to carry on these shows, which are scheduled between 5:00 o'clock and 10:30 o'clock P.M. on the dates noted."
>
> "We respectfully request that these scheduled activities be exempted from the proposed ordinance, upon its passage, pursuant to Section 32-8-9 (e) of the ordinance, and we hereby request permission to continue with these shows on the dates indicated pursuant to 32-8-11 (b) and (c).

The City Commission granted the exemption to terminate September 4, 1972, at 10:00 o'clock P.M. They granted the exemption because Respondent had scheduled their races prior to the passing of the ordinance:

> "The Board of City Commissioners, at its meeting today, considered your request referred to as Petition No. 491 of 1972, that the automobile races which you have scheduled at the State Fairgrounds for August 19 and 26-September 4, 1972, and also the 'Tournament of Thrills' for August 21 and 22, 1972 between 5:00 p.m. and 10:30 p.m. on said

dates, be exempted from the proposed 'Noise Abatement' ordinance, upon its passage, pursuant to Section 32-8-9 (e) of the ordinance, and for permission to continue with these shows *on the dates* indicated pursuant to Section 32-8-11 (b) and (c)."

"Inasmuch as these commitments were made prior to the adoption of the noise ordinances, the City Commission granted your request, subject to the provision that these activities will conclude at 10:30p.m. on the dates requested. Thereafter, full compliance with the noise ordinance will be necessary. (Emphasis added)"

On the 6th day of September, 1972, after the exemption had expired, the Respondent conducted races which violated the "Noise Control" ordinance. This race was the last race of the 1972 season, but on April 9, 1973, the Respondent requested a special permit from the Salt Lake City Commission to conduct races during the 1973 season which would violate the "Noise Control" ordinance. A hearing was held May 10, 1973, pursuant to that request, to consider the merits of the request. At the hearing the Respondent, through its president, Ferrol Papworth, represented that it would be impossible for them to conduct legal races unless their request was granted. The Board of City Commissioners denied the request.

As the Respondent had conducted races on September 6, 1972 which were in violation of the "Noise Control" ordinance, and as it was not given an exemption by the Salt Lake City Commission for the 1973, the Attorney General's Office, acting for the Division of Exposition of the State of Utah, filed a notice of violation with the Respondent on May 12, 1973.

This notice of violation was authorized by paragraphs 9 and 16 of the Lease Agreement.

Respondent had in fact violated a local law (paragraph 9) which gave the Appellant the right to file a notice of violation pursuant to paragraph 16 of the lease agreement. Further it was reasonable to believe that Respondent could not comply with the ordinance provision unless changes were made.

This notice of violation gave the Respondent five days to cure, it was presented on the day of a race and if Respondent had been able to race that day within the allowed decibel limits of the "Noise Control" ordinance, the termination mentioned in paragraph 16 would not have become effective.

The actions of the Appellant were in concert with the provisions of the lease agreement. The procedure required by the lease agreement when the premises were used in violation of State law was followed. Consequently the trial judge committed reversible error in holding that the notice of violation was in violation of the lease.

POINT III.

THE COURT ERRED IN AWARDING DAMAGES TO THE RESPONDENT BASED ON ACTIONS OF THE APPELLANT WHICH WERE IN HARMONY WITH THE LEASE AGREEMENT AND NON-ACTION ON THE PART OF RESPONDENT WHO FAILED TO EITHER CURE OR CHALLENGE THE NOTICE OF VIOLATION.

The lease agreement itself sets up the method by which Respondent-Lessee is to be notified by Appellant-Lessor that Lessor has reason to believe Lessee is violating a local ordinance or cannot comply with the local ordinance. The Court failed to take into account the fact that the contract entitles Lessor to serve such a notice based on a reasonable belief. It is submitted that

Appellant had a reasonable basis for believing Respondent had, was or would violate the Salt Lake City Ordinance. The Statement of Facts shows that tests were run and Respondent knew that racing at the Fairgrounds would violate the noise levels imposed by the ordinance. Appellant knew of the action of Salt Lake City in denying the variance and was in fact in close contact with the City Attorney. That denial by the city was based on test results of Irvine Accoustical Engineers. Appellant knew that the lease was up for renewal and knew that Appellant was to race on the 12th. Based on information and belief the notice of violation was served pursuant to paragraph 9.

It is important to note that after the Appellant served its notice based upon what information it had the Respondent did absolutely nothing. Respondent did not run its race on the 12th as scheduled but cancelled it. It did not seek injunctive relief or try to respond to or challenge the notice of violation in any way. It served no letters on the Appellant saying a mistake had been made. Instead it did nothing to mitigate the effect of the notice of violation other than file a law suit for damages.

It is submitted that Respondent's had some affirmative duty to attempt to cure the notice of violation or in some way respond to the notice or challenge the notice in some way other than doing nothing about the notice. Respondent should not be awarded damages when Appellant sends a notice pursuant to a contract provision and Respondent does nothing about the situation.

The lease contemplates a possible termination of the lease in the event that the Respondent does not comply with all provisions of local state and federal law. (see paragraphs 9 and 16). A method was also

prescribed for the Appellant to proceed with steps to eventually terminate the lease if such a non-compliance, either actual or anticipatory, did occur. (Paragraph 16 of Lease Agreement.)

In order to effect any termination for non-compliance, either actual or anticipatory, the Appellant must comply with the method prescribed by the parties in the contract. There can be no termination unless the notice of termination complies with all requirements relating thereto. *Texas and N.O.R. Co., v. Phillips,* 196 F.2d 692 (1952). Where a contract is specifically mentioned in a notice given under it, the terms of the contract are controlling. Furthermore a notice given under a contract providing for such notice must be construed according to the intention of the parties to the contract. Therefore, in construing the notice of violation, (which is not a notice of termination) the terms of the contract for which such notice is given should be used in interpreting the notice. The lease agreement requires five days after a notice of violation is served for the Respondent to correct any violation. The parties to the lease agreement must have intended this five day leeway to allow the Respondent time to correct or cure violations or challenge the notice in order to prevent a forfeiture or a termination of the lease. Therefore, the Appellant in its notice of violation served notice that the Respondent had five days to correct its deficiency consist with the lease agreement. This would require some showing that Respondent could comply with the Salt Lake City noise ordinance or in some way change their requirements. If the Respondent corrected the violation in that five day period no termination could occur. As noted in 51 C-C.J.S. *Landlord and Tenant*, S114 (3) , a notice of termination must give Lessee the

time specified in the lease, prior to the time when forfeiture is declared. The Lessee is entitled to the time specified in the notice in which to cure the default, prior to the taking effect of the forfeiture. The notice of violation should not be construed otherwise since it is impossible for any one party to alter the terms of the lease agreement without the consent of the other party to the contract. In other words, it would have been impossible for the State of Utah to shorten the five day period as required by the lease agreement, or enforce a forfeiture if a cure was made.

The effect of a period for a tenant to cure a defect or a violation is found in the case of *Caranas v. Morgan Hosts*, 460 S.W. 2d 225 (1970). In that case the lease required the use of a particular kind of cash register on the premises by the Lessee. However, the Lessee failed to use such a cash register and the Landlord served a written notice to cure the defect within thirty days according to the lease, or be subject to termination without notice. The Court held that where the Appellant had failed to cure the defect that the breach was sufficient to justify a termination of the lease. Thus, where terms allow for a correction of a defect the tenant has the duty to cure the defect or to suffer a termination thereafter.

In the case of *Collins v. Isaacson*, 261 Iowa 236, 158 N.W.2d 14 (1968), the tenant did correct the violation within the time allowed and was therefore not required to suffer a termination of his lease. With respect to the thirty day period for correction the court said the following:

> Further, the lease prepared by Plaintiff, provides, as quoted supra, that a forfeiture could be declared if defendant failed to make the payment contemplated therein or to perform any of its covenants, by serving a

> thirty day notice of forfeiture, provided defendant 'shall fail to pay said sum or sums, or perform said conditions in default within said thirty day period. . . .' It stands admitted that within the thirty day period defendant made a good and sufficient tender to Plaintiff of all sums due him under the lease-option agreement in the event the option were exercised. Plaintiff's right to declare a forfeiture of the agreement did not mature.

Additional support for the conclusion, that a tenant has an affirmative duty to correct defects during a period allowed therefore, is found in 17 Am.Jur. 2d *Contracts* S356.

> In some cases, a notice of default is required and the purpose of such a notice in the usual case, is to give the party allegedly in default an opportunity to remedy the default and meet his obligations.

From the preceeding authority it is clear that a tenant is allowed the period noted in a lease agreement to correct any violation noted by the landlord. If he corrects the violation within that time the landlord's right to a forfeiture does not mature and no forfeiture can take place. However, if he fails to correct the violation in that time then the right to declare a forfeiture does mature and unless the landlord otherwise waives the right to a forfeiture the lease will terminate.

The Appellant served a notice of violation upon the Respondent on May 12, allowing the five day period for correction of the violation. Had the Respondent corrected the violation or made any attempt to indicate the violation did not exist or would be corrected, a right to declare a termination would not have matured in favor of the Appellant. It was the duty of the Respondent to correct the violation or else suffer the results of a termination. However, there is no evidence

that the Respondent attempted any such correction in order to continue its lease. In fact the testimony is that Respondent chose not to run the race or cure the allegations set forth in the notice of violation. In the *Caranas* case, supra, when the Lessee failed to correct the violation the lease was held to be terminated by the court. The Respondent should not be allowed now to come forward and request damages after it has already failed in its duty to correct the violations noted in the notice of violation. Had the Respondent made an attempt to correct the violations as in the *Collins* case, supra, and succeeded in correcting the violation as it did in that case, there would have been no reason for a termination and they would have continued racing for the 1973 season without any problem.

It should be noted that the notice served on May 12 was only a notice of violation, and not a notice of termination. All the notice of violation attempted to do was to require the plaintiff to correct that violation if possible. Since that notice of violation served on the Respondent the Appellant has constantly reminded the Salt Bowl Company that they could conduct races on the State Fairgrounds if they would comply with the Salt Lake City Noise Ordinance. This, in effect, has extended the five day period to allow them to show a correction of any violation. However, the Respondent has failed to meet this duty to show a correction in order to justify any extension of the lease. Therefore, the Respondent should not be allowed to come forward requesting damages after numerous opportunities to show their lease should be continued.

The court erred in finding a wrongful termination of the lease based on the notice of violation being in violation of the terms of the lease. The notice by the terms of the lease calls for termination if the violation is

not challenged. The duty to stop the termination is on the Respondent which duty Appellant submits Respondent did not discharge in any way or even attempt to discharge in any way.

SUMMARY and CONCLUSION

It was error for the Court to find that Appellant wrongfully terminated the lease. In order to so find the Court committed error by finding the notice of violation was not legally justified when the terms of the lease (Paragraphs 9, 16) specifically outline the procedure by which a notice of violation is to be served and on what basis. The notice of violation itself specifically states it was served pursuant to paragraph 9 of the Lease. The Court found that the race on the 6th (which is the day mentioned in the notice of violation) was in violation of the ordinance which simply means that the Court found sufficient evidence to conclude that races run on a regular basis without some modification for noise were run at noise levels in excess of the ordinance requirements. This means that the races were run in excess of the noise levels and it is reasonable to believe that any other races would also be in excess of the noise levels required by the ordinance. The testimony from the Attorney General's office was that it was concern for the noise levels and the fact that no variance was granted by the City which

prompted its service of the notice of violation. The notice of violation doesn't terminate the lease unless the Respondent fails to do some affirmative act to cure, challenge or comply. The testimony is that Respondent did nothing and in fact cancelled its race on the 12th which could have shown compliance if the noise levels had been below those required by the ordinance. *It was the act of the Respondent in doing nothing that caused the termination not the notice of violation served by Appellant.*

It was error for the court to award damages as the contract was not wrongfully terminated but required the non-action of the Respondent to effect the termination. The Respondent did not attempt in any way to mitigate its damages, challenge the notice or resist the effect of the notice of violation.

It is submitted that it was clearly error for the Court to find for Respondent in this matter when there was a basis for a notice of violation and the Contract procedures were followed. The Respondent clearly did nothing to resist the effect of the notice of violation and as the Court concluded was running races at noise levels above those set forth in the ordinance. The race on the 6th was in fact a violation and without a variance any other race would be a violation. The Respondent failed to obtain a variance and the notice was served. If the notice had not been served the Appellant is then in the position of reasonably knowing of illegal and unlawful practices on the premises and doing nothing about it. As a public body the Appellant felt it had a duty to serve the notice of violation as Respondent could always race if it were in compliance. However, Respondent never took the opportunity to show it could and its past history would reasonably lead one to believe it could not comply.

To rule for Respondent as the court did is reversible error and Appellant prays for a reversal of that ruling as a matter of law.

Respectfully submitted,

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